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No. A-209

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

ROY M. COHN, G. DAVID SCHINE and
SAXE, BACON & BOLAN, P.C.,

Petitioners,

-against-

NATIONAL BROADCASTING CO., INC.,
UNIVERSAL CITY STUDIOS, INC.,
and GEORGE ECKSTEIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the libels alleged by the petitioners were sufficient to withstand a motion to dismiss the entire complaint; and

2. Whether the "public figure" petitioners should have been allowed pre-trial discovery to inquire into the editorial process of the defendants, in order to acquire evidence of actual malice.

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The petitioners, Roy M. Cohn, G. David Schine, and Saxe, Bacon & Bolan, P.C., pray that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals of the State of New York rendered in these proceedings on June 5, 1980.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 1a-2a. The opinion of the Supreme Court of the State of New York, County of New York, is unreported, and appears at Appendix B, pp. 3a-46a. The Appellate Division modified the judgment of the Supreme Court of the State of New York, in an opinion reported in 67 A.D. 140, and appearing at Appendix C, pp. 47a-64a.

JURISDICTION

The order or judgment of the Court of Appeals of the State of New York was entered on June 5, 1980. See Appendix A, p. 1a. An order extending time to file petition for Writ of Certiorari to October 3, 1980 was signed

September 5, 1980. See Appendix D, pp. 65a-66a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

Constitution of the United States, Amendment XIV, §1 ...nor shall any state deprive any person of life, liberty or property without due process of law...

Constitution of the United States, Amendment I ...or abridging the freedom of speech, or of the press...

STATEMENT OF FACTS

Petitioners Roy M. Cohn (Cohn), G. David Schine (Schine) and Saxe, Bacon & Bolan, P.C. (Saxe) commenced this action, by service of a summons and complaint, to recover damages for defama-

tion and invasion of privacy caused by a film entitled "Tail Gunner Joe" which was produced and/or exhibited to American audiences by the National Broadcasting Co., Inc. (NBC), Universal City Studios, Inc. (Universal) and George Eckstein (Eckstein) (collectively referred to herein as "defendants").

The defendants moved to dismiss both the defamation and privacy counts for failure to state a cause of action.

The New York Supreme Court, Special Term, Part I (Hon. Max Bloom, J.) denied the motion to dismiss the first cause of action (the defamation claim) and granted the motion to dismiss the second cause of action (the privacy claim) (see appendix, pp. 3a-46a).

On appeal, the Appellate Division, First Department (Mr. Justice Fein)

affirmed the Special Term Decision dismissing the second cause of action; but modified the Special Term decision, on the law, and granted the motion to dismiss the first cause of action (see Appendix, pp. 47a-64a). By so deciding, the Appellate Division effectively issued a final judgment on the issue of liability and substantially modified the order of the Special Term.

On appeal, the Court of Appeals affirmed the decision of the Appellate Division for the reasons stated in the opinion of Mr. Justice Fein.

The facts relevant to the history of this case are as follows: Plaintiff Cohn was engaged as Chief Counsel to the United States Senate Permanent Subcommittee on Investigations of the Committee on Governmental Operations during 1953 and 1954 and is now success-

fully engaged in the practice of law. Plaintiff Schine served as an unsalaried Chief Consultant for the above-mentioned Subcommittee during 1953 and 1954. Saxe is now and has been for many years a professional corporation successfully engaged in the practice of law and the employer of Cohn.

Upon becoming aware that the defendants planned to make a film entitled "Tail Gunner Joe" (a depiction of the life of Senator Joseph McCarthy), plaintiffs Cohn and Schine wrote to Herbert Schlosser, President of NBC, and sent copies of their letters to Universal. Cohn and Schine therein explicitly withheld their consent to the use of any actors to represent them and requested, in the interest of fairness and accuracy, to be given an opportunity to view the said movie with an eye towards contribu-

ting to the correction of any inaccuracies or misrepresentations.

In response, plaintiff Cohn received a letter from Sheldon M. Mittleman, attorney for Universal, who stated that, "it would be an injustice to seek advice and opinions from only a select group", indicating that Universal obviously felt they had the "facts" they wanted and did not intend to conform their film to facts that might be supplied by Cohn, who, as a participant in the events depicted, could easily have spotted inaccuracies and misrepresentations contained therein.

Cohn, in subsequent letters to Mittleman and to Sam Gerber, Assistant Counsel to NBC, expressed his disappointment in defendants' responses.

Subsequently, on or about February 6, 1977, NBC caused to be broadcast

over its national network a three-hour film entitled "Tail Gunner Joe", which depicted events occurring before and leading up to and including the so-called "Army-McCarthy Hearings" in 1954. Within said film actors were used to portray Cohn and Schine.

Pursuant to the instances of defamation and invasion of privacy contained in said film, plaintiffs commenced this action by service of a Summons and Complaint on defendants on or about April 14, 1977 and service of an Amended Complaint on or about July 11, 1977.

The subject libelous assertions are, in brief:

1. That Cohn and Schine engaged in a campaign to burn books of reputable and well-known authors;

2. That Cohn was at fault in the Army-McCarthy hearings for the "Fred

Fisher" incident (in which McCarthy named a young lawyer named Fisher a communist on television), when in fact Cohn had protested the incident to McCarthy, was not responsible for it and had attempted to prevent the incident. The sequence neatly omits Cohn's note of protest to McCarthy;

3. That Cohn had no legitimate qualifications to act as Chief Counsel to the Subcommittee;

4. That Cohn was standing at the gates of Fort Dix the morning Schine was inducted, implying that Cohn had nothing better to do;

5. That Cohn was bent on the destruction of individual freedoms. Such an assertion is the clear implication and intendment of the cumulative portrayal of Cohn in the film; and

6. In referring to McCarthy,

one of the fictional characters of the film comments, "he himself caught no communists, found no traitors, uncovered no subversives, not one", clearly implying that McCarthy and his associates (including Cohn and Schine) were involved in an unjustified witch hunt.

In sum, it is asserted that each of the above-noted allegations are false. Cohn is not a hater of literature, a book burner, was not responsible for the "Fisher" incident, is not a ruthless man bent on destroying individual freedoms, and is not an unqualified attorney guilty of incompetence and impropriety in representing his client, the United States of America.

Prior to the airing of said film, defendants, although in receipt of offers by Cohn and Schine to assist in the correction of inaccuracies and

misrepresentations, made no attempt to verify the truth of the subject portrayals with the plaintiffs, who were clearly historical experts on the subject matter.

By an order of Justice Max Bloom, dated March 9, 1978 and entered March 13, 1978, responding to defendants' motion to dismiss the complaint, the second cause of action was dismissed. The Court stated that, "in the absence of showing that the advertising was consciously false, i.e. that it was uttered with knowledge of its falsity or with reckless disregard of the truth, or that the actors selected were such as to construe a defamatory act, no cause of action is made out." (Appendix p. 40a).

The Appellate Division modified the Special Term decision in a decision

dated April 5, 1979, to grant the motion to dismiss the first cause of action. In dismissing plaintiffs' defamation claim the Appellate Division stated:

> "no showing of falsity and no showing that the film was composed and thereafter exhibited with actual malice. The general conclusory assertion that it was maliciously published is insufficient". (Appendix, p. 62a.)

The Court of Appeals, in a decision dated June 5, 1980, unanimously affirmed the Appellate Division decision, stating that "we agree with the Court below that none of the individual passages of which the plaintiffs complain are defamatory to them. We would add only that in our view the cumulative effect of all such passages cannot be said to be defamatory." (Appendix, p. 1a). The Court of Appeals, implicit in its decision, also denied plaintiffs the opportunity to conduct pre-trial discov-

ery toward the issue of actual malice.

REASONS FOR GRANTING THE WRIT

1. The Federal Questions Herein Have Been Decided Below in a Way Which is Not in Accord with the Applicable Decisions of This Court.

A "public figure" plaintiff must establish not only defamation but also that the defamation was accomplished with actual malice - i.e., with knowledge that the subject defamation was false or with reckless disregard of whether it was false or not. Rinaldi v. Holt, Rinehart, 42 NY2d 369 (1975).

Thus, in Buckley v. Littell, 394 F. Supp. 918 (S.D.N.Y. 1978), the Court stated that the "reckless disregard requirement has been defined to mean that the defendant must be shown to have had an awareness of probable

falsity" (at 931). That Court went on to say, at page 932, that:

> "There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970).

Clearly, this "reckless disregard requirement" is not one which must be satisfied prior to the beginning of pre-trial discovery, at the time of a premature motion to dismiss.

Indeed, in Herbert v. Lando, 441 U.S. 323, 99 S.Ct. 1635, 41 L.Ed.2d 115 (1979), this Court specifically held that a "public figure" plaintiff asserting a libel claim could not be barred by First Amendment principles from inquiring, during pre-trial examination, into

the editorial process of defendants in order to acquire evidence of actual malice:

> "It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error. In Butts, for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice. The damages verdict was sustained without any suggestion that plaintiff's proof had trenched upon forbidden areas." (at 124).*

This Court specifically recognized that a libel plaintiff is entitled

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* Citations to the Lando decision are from 60 L.Ed.2d No. 1, May 25, 1979 (pp. 1-249).

to undertake pre-trial examination in order to establish the critical element of malice:

> "We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as Herbert. The case for making this modification is by no means clear and convincing and we decline to accept it.
>
> "In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by New York Times. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be known by direct evidence through inquiry into the thoughts, opinions and conclusions of the publisher but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs

> will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with 'convincing clarity', New York Times v. Sullivan, 376 U.S., at 285-286." (at 129-130).

The Lando decision is directly applicable to the case at bar and, we submit, the action by the Court of Appeals cannot be squared with the Lando requirement, in that the plaintiffs should have been permitted discovery into the "good-faith" of the defendants in publishing the subject portrayals.

Indeed, this Court expressly

recognized in Lando that pre-trial examination of a libel defendant may furnish proof of malicious intent that might otherwise be lacking:

> "But as we have said, our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood and if indirect proof of this element does not stifle truthful publication and is consistent with the First Amendment, as respondents seem to concede, we do not understand how direct inquiry with respect to the ultimate issue would be substantially more suspect. Perhaps such examination will lead to liability that would not have been found without it, but this does not suggest that the determinations in these instances will be inaccurate and will lead to the suppression of protected information. On the contrary, direct inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests that more accurate results will be obtained by placing all, rather than part, of the evidence before the decisionmaker." (at 131; emphasis ours.)

Lando establishes that a libel plaintiff who has presented some evidence of damages to reputation and of actual malicious intent -- as plaintiffs have done here -- is entitled to a pre-trial examination to bolster and augment its claim of libel and actual malice. Accordingly, we submit that, at a minimum, plaintiffs herein were entitled and should have been allowed to conduct pre-trial examinations of defendants in order to garner additional evidence of libel and malice.

Justice Fein specifically centered his decision in the Appellate Division on the absence of actual malice (Appendix p. 62a). Such discovery would be necessary, in light of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 789 (1924) to satisfy the necessity of showing actual malice.

Further, the Court of Appeals incorrectly stated that the passages complained of failed to raise a claim of actionable libel (Appendix p. 2a). An actionable libel may be created by a cumulative portrayal. As stated in Buckley v. Littell, 394 F.Supp. 918, 925 (S.D.N.Y. 1975):

> "It is necessary to make a judgment based upon the alleged libelous material as a whole, rather than on the basis of isolated or detached individual sentences or statements. November v. Time, Inc., 13 N.Y.2d 175, 178, 244 N.Y.S. 2d 309, 194 N.E.2d 126 (1963). The test of whether a passage is libelous or not is what the overall effect would be upon an ordinary reader. Everett v. Gross, 22 A.D.2d 257, 254 N.Y.S.2d 561, 563, 254 N.Y.S. 2d 561 (1st Dept. 1964)."

In light of the assertions of the said film (including accusations of book burnings and witch hunts), the Court of Appeals obviously erred in

their assertion that Cohn and Schine were not defamed. It is well settled that an individual's interest in his own reputation is a basic concern. Time, Inc. v. Firestone, 424 U.S. 488, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). The Court of Appeals recognized that this concern is of utmost importance when, in November v. Times, Inc., 13 NY2d 175, 244 NYS2d 309, 194 N.E. 126 (1963), the Court stressed that a court should not take the case from the jury simply because the subject portrayal could be taken in an inoffensive sense:

> "The courts 'will not strain' to interpret such writings 'in the mildest and most inoffensive sense to hold them non-libelous' (Mencher v. Chesley, 297 N.Y. 94, 99, 75 N.E.2d 257, 259). The words are to be construed not with the precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed." (at 178)

The Special Term recognized that there was a triable question presented as to whether Cohn or Schine were in fact defamed (Appendix p. 42a). The very fact that there was a difference of opinion between the Special Term and the Court of Appeals, underlines the existence of triable question of fact, especially in the light of Time, Inc. v. Firestone, supra. The unnecessary and highly damaging depiction of the "Fred Fisher" incident and the "book-burning" scene can have no other purpose than to create the malicious impression that Cohn and Schine were unrestrained zealots bent on destroying American institutions.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to re-

review the Judgment and Opinion of the Court of Appeals of the State of New York.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 278

Roy M. Cohn, et al., Appellants,

v.

National Broadcasting Co., Inc., et al., Respondents.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(278)Louis Biancone, John F. Lang, Vincent P. Nesci, & Howard F. Husum, NYC, for appellants.
John C. Sabetta, NYC, for respondents.

MEMORANDUM

The order appealed from should be affirmed for the reasons stated in the opinion of Mr. Justice Fein at the Appellate Division (67 AD2d 140).

We agree with the court below

that none of the individual passages of which plaintiffs complain are defamatory as to them. We would add only that in our view the cumulative effect of all of such passages cannot be said to be defamatory. While it is true that the courts "'will not strain' to interpret [allegedly defamatory works] 'in their mildest and most inoffensive sense to hold them nonlibelous'" (November v Time Inc., 13 NY2d 175, 178, quoting Mencher v Chesley, 297 NY 94, 99), it is also true that courts will not strain to find a defamatory interpretation where none exists (see Tracy v Newsday, Inc., 5 NY2d 134).

* * * * * * * * *

Order affirmed, with costs, in a memorandum. All concur.

Decided June 5, 1980

APPENDIX B

CAL. NO. 82-1/17/78

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM : PART I
- - - - - - - - - - - - - - - - - x

ROY M. COHN, et al.,

Plaintiffs, Index Number 07079/77

-against-

NATIONAL BROADCASTING CO., INC., et al.,

Defendants.

- - - - - - - - - - - - - - - - - x

MAX BLOOM, J.:

Defendants, National Broadcasting Co., Inc., (NBC) and Universal City Studios, Inc., (Universal) move to dismiss the complaint herein upon the ground that it fails to set forth a cause of action (CPLR 3211[7]), or, in the alternative, requiring plaintiffs separately to state and number the mat-

ters set forth in the complaint (CPLR 30]4) and to strike certain allegations contained therein as scandalous or prejudicial (CPLR 3024[b]). One George Eckstein is named as an additional defendant. However, he is not joined in the motion. Whether he has yet been served with process is not indicated.

The plaintiffs are Roy M. Cohn, G. David Schine and Saxe, Bacon and Bolan, P.C., of which, the plaintiff Cohn is a senior partner. The complaint to which the motion is directed sets forth two causes of action, and is based upon the production by Universal of a film entitled "Tail Gunner Joe" and the exhibition of that film by NBC. The first count is bottomed upon an alleged conspiracy to defame plaintiffs Cohn, Schine, and Saxe, Bacon and Bolan, P.C., and seeks compensatory damages of

$5,000,000 and punitive damages of $15,000,000. The second cause is predicated upon an alleged invasion of privacy, and seeks additional compensatory damages of $5,000,000 and exemplary damages of $15,000,000.

I

The period covered by the controversy, the McCarthy era, is one of the more somber periods in twentieth century American life. The recurrence of these periods has been part of the American phenomena. Since the October (Bolshevik) Revolution of 1917, these items of turbulence have involved fringe elements in our society and have revolved about the Communist threat to the western world. Nevertheless, and because these actions have invariably called into question, and trespassed

upon, the civil rights and liberties of all, they have frequently occupied center stage. The Palmer raids, and its New York throwoff, the Lusk Committee, the exclusion, in 1921 of the five Socialists from the New York State Assembly; the case of Sacco and Vanzetti; and the Rapp-Coudert Committee have all had their passionate defenders and violent detractors. The demagogues spawned by the Great Depression, the most prominent of whom was the late Senator Huey P. Long, and who included, among the more notorious, Father Charles E. Coughlin, Dr. William Wirt, Gerald L.K. Smith, Gerald B. Winrod, and Elizabeth Dilling commanded much attention even though they attracted few followers. Organizations such as the Khaki Shirts, the Silver Shirts, the Crusaders for Economic Liberty, the American Vigilantes and

Sentinels of the Republic claimed their moments in the spotlight and then disappeared. Less in the public view were the literary and philosophical fascists among whom were numbered, Ezra Pound, Lawrence Dennis and Seward Collins.[1]

The Hitler-Stalin Pact of August, 1939, orchestrated the anger against Communism and those thought to be Communists. Even persons who believed that the Soviet experience might furnish some suggestions for overcoming our own economic malaise were revolted by this exhibition of great power duplicity. The anger was exacerbated when, less than a week after the pact, Hitler's hordes

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1- For an excellent short dissertation on the Depression Demagogues see Schlesinger "The Politics of Upheaval" (Houghton, Mifflin Co., 1960), pp. 16-207.
See also Williams "Huey Long" (Alfred A. Knopf, 1969).

invaded Poland, unleashing the most frightful and bloody war in the oft anguished history of mankind. The rage became greater when, before the month was out, Poland was divided between the Third Reich and the Soviet Union, thus disclosing the full range of Soviet hypocrisy and deceit.

The following spring Hitler ravaged Europe. Belgium, Holland and France fell beneath his iron heel. Only the moat which separated England from France, the English Channel, prevented invasion of the British Isles. For more than a year the toothless lion reeled under the relentless onslaught of the Luftwaffe. Then, almost without warning, Hitler turned east. In the early morning of June 21, 1941, Hitler began his war against Russia, and with the attack, the mounting hatred of

Communism began to subside. Prime Minister Churchill led the way in his address to the British people on the evening of June 21. In that speech, he recalled to his people that "No one has been a more consistent opponent of Communism that I have for the past twenty-five years. I will unsay no word that I have spoken about it. But all this fades away before the spectacle which is now unfolding***".

"I have to declare the decision of His Majesty's Government--and I feel sure it is a decision in which the great Dominions will in due course concur--for we must speak out now at once, without a day's delay. I have to make the declaration, but can you doubt what our policy will be? We have but one aim and one single irrevocable purpose. We are resolved to destroy Hitler

and every vestige of the Nazi regime. From this nothing will turn us--nothing. We will never parley, we will never negotiate with Hutler or any of his gang. We shall fight him by land, we shall fight him by sea, we shall fight him in the air, until, with God's help, we have rid the earth of his shadow and liberated its peoples from his yoke. Any man or state who fights on against Nazidom will have our aid***. That is our policy and that is our declaration. It follows, therefore, that we shall give whatever help we can to Russia and the Russian people. We shall appeal to all our friends and allies in every part of the world to take the same course and pursue it, as we shall faithfully and steadfastly to the end."[2]

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2- Churchill, "The Grand Alliance", (Houghton, Mifflin Co., 1950), pp. 371-372.

The attack on Pearl Harbor came less than six months later. The terrible privations of the Russian people[3] and the fact that we were allied in waging war against a common foe, muted almost completely, criticism of the Soviet regime.

As the war moved beyond the battle of Stalingrad, with the Nazi armies in retreat and the Russians in pursuit, it became apparent that the lands in eastern Europe "liberated" by the Soviets were to become part of Moscow's colonial empire. As the iron fist of Hitler faded in these areas, the iron fist of Stalin became more apparent. Nor was the appetite of Russia sated by her eastern European

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3- Salisbury "The 900 Days" (Harper & Row, 1969); Werth, "Russia at War" (Dutton, 1964).

conquests. As the battle ceased, the chaos left by the war in France, Italy and Greece gave her the opportunity to fish in troubled waters.

Thus began the "cold war".[4] With the victory of the Communists in China,[5] the American mood was crystalized and the stage set for the events which form the basis of this suit.

II

The late Joseph R. McCarthy, about whom this suit revolves, first sought election to public office in 1936, as the Democratic candidate for District Attorney in Shawano County, Wisconsin.

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4- Halle, "The Cold War as History" (Harper & Row, 1967)

5- White and Jacoby, "Thunder Out of China" (William Sloane Associates 1946); for a history of events immediately prior to the takeover by the Chinest communists see Tuchman, "Stillwell and the American Experience in China" (Macmillan, 1970).

Defeated in this first run, he met with greater success in 1939 when he was elected a judge of Wisconsin's Tenth Judicial Circuit. In June 1942, he applied for enlistment in the MaRine Corps, into which he was accepted the following month with the rank of lieutenant.

Much has been written about the McCarthy war record. Indeed, it forms part of the central allegations of the complaint. Whether he was ever wounded in combat and whether he ever used the phrase that he carried "ten pounds of shrapnel" in his leg is an issue that is still much debated. There is evidence that he suffered an injury to his foot in a "shellback" ceremony while crossing the equator in the seaplane tender "Chandeleur". McCarthy himself disclaimed any shrapnel wound in a television interview, contending that

the injury occurred during an airplane accident.

Be that as it may, in 1944, before his resignation from the Marine Corps had become effective, McCarthy stood for the Republican nomination for U.S. Senate. He was defeated in the primary by the then incumbent, the late Alexander Wiley. Two years later, he entered the Republican primary for the same office against the late Robert M. LaFollette, Jr. It is intriguing to note that in that campaign, the State Council of the CIO, then Communist controlled, angered by LaFollette's unalterable anti-Communist stance, threw its complete support to McCarthy, who won the primary by a total of 5,378 votes, approximately 1 1/4 per cent of the vote cast.

The first three years of the

McCarthy era were uneventful. Not until February, 1950, did he project himself into the national limelight by his charges of "card carrying Communists" in the State Department. While the number varied from speech to speech, the charge remained the same. It is in January, 1953, however, when he became Chairman of the Committee on Government Operations and Chairman of its Permanent Subcommittee on Investigations, that the story depicted by the complaint in this action begins. Plaintiff Cohn was designated as Chief Counsel to the Permanent Subcommittee on Investigations and plaintiff Schine served as an unsalaried Chief Consultant to the Subcommittee.

To say that the period which followed was one of the most tumultuous in twentieth century American history

would be grossly to understate the case. Reputations were ruined and careers destroyed. Not until the Army-McCarthy hearings and the resultant vote by the United States Senate to censure the Senator from Wisconsin did some semblance of sanity return to the nation.[6]

This capsulated summary of a portion of the history of our time and the actions of Joseph R. McCarthy in the context of that history is merely to demonstrate the confluence of time and the man and the heritage they left as they fed each upon the other.

III

The evaluation of the competing

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6- The entire 92 page April, 1954 issue of "The Progressive" is devoted to an in-depth study of Senator McCarthy and his methods. While the magazine, founded by Robert M. LaFollette in 1909 is defunct, copies are still to be found.

social interests of the individual in the sanctity of his reputation and the right of the media to publish has long been a vexing problem. It was inevitable that the sometimes subtle tensions between the law of defamation and the First Amendment would not survive a later period of turmoil, the civil rights revolution of the 1960s. The seminal decision (New York Times Co., v. Sullivan, 376 U.S. 254), arose out of the publication of an advertisement in the New York Times seeking to enlist support for "***thousands of Southern Negro students [who] are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights". (376 U.S. at p. 256). Part of the advertisement referred to truckloads

of police, armed with shotguns, ringing the campus of Alabama State College in Montgomery. Another portion adverted to the fact that Dr. Martin Luther King had been arrested on seven occasions. Sullivan, who was Commissioner of Public Affairs, a position which encompassed control of the city's police, utilizing certain inaccuracies in the ad and claiming that he had thereby been libeled, sued and recovered judgment in the sum of $500,000. It was obvious that verdicts of this magnitude would soon compel a newspaper to impose self-censorship. Thus, the Court was brought face-to-face with the competing interests. In determining that "***the background of profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include

vehement, caustic and sometimes unpleasant sharp attacks on government and public officials" (376 U.S. at p. 270), it came down heavily on the side of free speech. Recognizing that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive" (376 U.S. at pp. 271, 272), it held that "[t]he constitutional guarantees require,***a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (376 U.S. at pp. 279, 280). It is noteworthy that Sullivan limits its

applicability to the official conduct of public officials.

A scant two years later the Supreme Court expanded its definition of "public official" to include "***at the very least***those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility or control over the conduct of governmental affairs" (Rosenblatt v. Baer, 383 U.S. 75, 85). In that case, the person allegedly defamed was the supervisor of a recreational area, who was held to be within the ambit of the definition of "public official".

In Curtis Publishing Co., v. Butts, and Associated Press v. Walker, decided in a single opinion (388 U.S. 130), the emphasis shifted. Butts was the athletic director of the University

of Georgia. Although Georgia is a state university, Butts was employed by the Georgia Athletic Association, a private corporation rather than by the State of Georgia. He was charged in an article in the Saturday Evening Post with "fixing" a football game with the University of Alabama. Suit was brought and Butts was awarded a verdict of $60,000 in compensatory damages and in addition, very substantial punitive damages.

Walker, a retired general in the U.S. Army, was charged in a newspaper dispatch, with encouraging the rioters who sought to prevent the enrollment of James Meredith at the University of Mississippi. Walker brought suit which resulted in a verdict of $500,000 in compensatory damages, and in addition, punitive damages. Recognizing that neither Butts nor Walker were public

officials, the Court noted the need to recast the limited scope of Times Co., v. Sullivan. Accordingly, it gave constitutional dimension to new doctrine that a public figure "***who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (388 U.S. at p. 155).

Butts and Walker were followed by Rosenbloom v. Metromedia, Inc., (403 U.S. 29). It would be pointless to endeavor to dissect the five separate opinions, none of which commanded the authority of a majority of the Court. It is sufficient only to point out that

it introduced a new element into a situation already bedeviled by complexity. To the elements of public officer and public figure it added the subjective standard that the event reported be of public or general interest. "The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety". (403 U.S. at p. 43).

Next in the line of key decisions is Gertz v. Robert Welsh, Inc., (418 U.S. 323). Gertz involved an attorney who was neither a public officer nor a public figure. He represented, in a civil suit, the family of a young man who had been shot and killed by a policeman. Respondent published "American Opinion", a vehicle for the John

Birch Society, in which Gertz was charged with being a member of numerous organizations alleged to be Communist, and sought to link him with "***the Communist attack on the Chicago police during the 1968 Democratic Convention" (418 U.S. at p. 325), all in the endeavor to establish a conspiracy to frame the police officer. Petitioner sued and recovered a verdict of $50,000 which was set aside by the trial court, who directed the entry of a verdict in favor of defendant upon the authority of Times Co., v. Sullivan, even though Gertz was neither a public official nor a public figure. In holding that Times Co., v. Sullivan (supra) and Curtis Publishing Co., v. Butts (supra), had no application to a situation involving a private citizen, the Court took occasion to note that public officials and public figures had greater

access to the media and, therefore, were less vulmerable to injury. A private individual, on the other hand, "***has relinquished no part of his interest in the protection of his own good name, and consequently, he has a more compelling call on the courts for redress or injury inflicted by defamatory falsehood" (418 U.S. at p. 345). In leaving to the states the power to regulate the legal remedy for actionable defamation in such cases, the Court sought to eliminate from consideration the Rosenbloom emphasis on whether the issue involved in the publication is a matter of general or public interest. Under Gertz, two rules, each with different consequences, run parallel to each other. One involving public officials (Times Co., v. Sullivan, supra), and public figures (Curtis Publishing Co., v. Butts, supra) and one

involving private individuals.

The final holding in this chain of cases is Time, Inc., v. Firestone (424 U.S. 448). It adds little to the law, holding only that parties to a private divorce action do not become public figures, no matter how lofty their social status and no matter how lurid the circumstances of the divorce. The reversal of the Florida courts, which correctly followed Gertz, was bottomed upon procedural irregularities.

The courts of this state have followed Times Co., v. Sullivan and its progency faithfully and closely (Rinaldi v. Holt, Rinehart and Winston, Inc., 42 N Y 2d 369; James v. Gannett Co., 40 N Y 2d 415). Indeed, they have gone beyond the limitations set by Gertz and in the area left to the states for

development of their own tort doctrine, they have held that those who participate, either as principals or as paid advisors, in the debate on issues of grave general interest subject themselves to public scrutiny even though they are neither public officers or public figures. Freedom of speech is essential to the preservation of the democratic process. On issues of great public concern opinions may, and frequently do, differ widely. Untrammelled debate, with a right of free expression exercised within constitutional limits, is to be encouraged to facilitate an exchange of information and the reaching of an informed, though not necessarily a wise, conclusion. Opinions on public issues should not be unduly limited in expression. Unless their public voice is premised upon false facts, evidence

a reckless disregard for the truth, or are actuated by malice, the right to speak is secured and protected by the First Amendment" (Cole Fisher Rogow, Inc., v. Carl Ally, Inc., 29 A D 2d 423, at p. 429; affd. 25 N Y 943).

IV

The charge of violation of the right of privacy falls into a somewhat different category. Although the claim is bottomed on §§50 and 51 of the New York Civil Rights Law, which prohibit the use of another's name, portrait or picture for advertising or to promote the sale of goods, it became apparent once Times Co., v. Sullivan (supra) had been decided, that the statutes were invested with constitutional subtleties. Thus, in Spahn v. Julian Messner, Inc., (18 N Y 2d 234), the privacy doctrine

was construed so that the statutory rights granted by §§50 and 51 were of little value to a newsworthy person. Only where the reporting is distorted and largely fanciful is refuge given by the protective umbrella of the law. Spahn was taken to the Supreme Court which, between the determination by the Court of Appeals and consideration by the Supreme Court, had decided Time, Inc., v. Hill (385 U.S. 374). The Supreme Court remanded Spahn I to the Court of Appeals (387 U.S. 239) for reconsideration in the light of Hill. Time Inc., v. Hill (supra), involved a family, who resided in Pennsylvania and who were held hostage by some escaped convicts for some nineteen hours. Some six months later, a fictionalized version of their ordeal was published under the title "The Desperate Hours". Subse-

quently, the book was made into a play. Nowhere in the book or the play was the name of the Hill family mentioned and many of the events portrayed differed from those which had occurred.

The review of the play by Time, Inc., and the pictures published in the magazine concerning it specifically linked the play to the Hill family. The suit for invasion of privacy followed. Relying greatly upon Times Co., v. Sullivan, (supra), the Supreme Court held that the "***constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth" (385 U.S. at pp. 387, 388). It is interesting to note,

however, that, in contradistinction to Times Co., v. Sullivan (supra), the emphasis was placed on the nature of the event, i.e. whether the matter was of public interest, rather than on the involvement of a public official.

When Spahn II came before the Court of Appeals, it held (21 N Y 2d 124, app. dism. 393 U.S. 1046), that where a public figure is involved, recovery is not justified unless "***the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth" (21 N Y 2d, at p. 127). Thus, the privacy doctrine, although it involves a wholly different concept, was assimilated to the tort of defamation. The spotlight was again focused upon the person whose privacy

was invaded and whether the presentation is infected with material and substantial falsification. Indeed, truth becomes a defense in an arena in which truth or falsity should be immaterial.

Hill was followed by Cantrell v. Forest City Publishing Co., (419 U.S. 245). There, the newspaper published a human interest story about a widow and her five children and the dire poverty which followed in the wake of the death of the husband and father who was killed in the collapse of a bridge along with forty-three other people. The jury awarded plaintiff a verdict for compensatory damage, the Court having withdrawn the issue of punitive damages from their purview. The issue before the Supreme Court centered on whether the verdict could be permitted to stand in light of the trial court's implied hold-

ing that no "actual malice" was shown. In justifying the jury verdict, the Supreme Court noted that the story contained calculated falsehoods and the jury was plainly justified in finding that Eszterhas had portrayed the Cantrells in a false light through "knowing or reckless untruth" (419 U.S. at p. 253). Here, the Supreme Court adopted the reasoning of our Court of Appeals in Spahn II.

The final case in this line is Cox Broadcasting Corp., v. Cohn (420 U.S. 469). A Georgia statute made it a crime to disclose the name of a rape victim. Cohn was the father of a daughter who had been raped and did not survive the incident. During the course of the criminal proceedings against the defendants, a representative of the broadcasting company ascertained the victim's

name from the indictment. Thereafter, in a report of the proceedings, the victim's name was broadcast. Cohn sued for infringement of his privacy and recovered judgment. The Supreme Court, after interlocking the right of privacy and defamation, decided not to determine the broad constitutional issue presented to it. It reversed the Georgia courts on the narrow ground that once the name of the victim was emblazoned on the public record, it could, thereafter, be reported by any one, provided it was reported truthfully.

Meeropol v. Nizer (560 F.2d 1061, app. pending, ___U.S.___), involved both defamation and invasion of privacy. Both, seemingly, were intermingled in a single cause of action. The Meeropols are the natural children of Ethel and Julius Rosenberg, who were executed in

1953 after conviction for conspiring to transmit to the Soviet Union information relating to the national defense. Defendant Nizer wrote "The Implosion Conspiracy", which reviewed the trial and which was published in 1973. Suit was instituted shortly thereafter premised upon the claim that Nizer's account was inaccurate and fictionalized. In holding that the publication fell within the ambit of constitutional protection accorded to publications infringing privacy, the Court correctly noted that the matters covered by the book were within the orbit of public interest (Time, Inc., v. Hill, supra). However, it went further and noted that constitutional immunity also obtained because the persons involved were public figures.

V

With this as a basis, we pro-

ceed to examination of the complaint. The first cause of action alleges that defendants entered into a conspiracy to defame plaintiffs. Pursuant to the conspiracy Universal was to produce and NBC was to broadcast over television the film "Tail Gunner Joe" which was intended to be "a character assassination of the late Senator Joseph McCarthy and the principal figures involved with McCarthy especially during the so-called Army-McCarthy hearings, including Cohn and Schine.

Cohn and Schine, upon learning of the projected film by letters separately addressed by each of them to NBC and Universal, expressly withheld their consent to the use of any actors to represent them and requested an opportunity to view the movie so that they might contribute "to the correction of inaccuracies

or misrepresentations". NBC referred each letter to Universal, with refused the offer.

It is further averred that "Tail Gunner Joe" distorted and falsified the events depicted by consequence of which plaintiffs were defamed. Specific instances of this alleged distortion and falsification are set forth. These include two conversations between the late Robert F. Kennedy, then counsel to the minority members of the Permanent Subcommittee on Investigations of the Committee on Government Operations and Jean Kerr, then Administrative Assistant to Senator McCarthy, both of which it is claimed, never occurred. The first conversation concerned Cohn and the brief tidbit set forth indicates merely that Kennedy did not like Cohn and that Cohn did not laugh much. In the second con-

versation Kennedy refers to Schine as "young Lichinvar". Another instance of alleged defamatory conduct deals with a brief comment that the day following Schine's induction into the Army and his shipment to Fort Dix, Cohn was at the gates of the camp.

Of greater importance is an allegation, supported by a textual excerpt from the film, which indicates that the investigation of the U.S. Information Agency's Overseas Libraries was part of a campaign to burn books authored by Mark Twain, Stephen Vincent Benet, Sherwood Anderson and others. Additionally, there is included, a textual excerpt from the film which raises serious claims as to the McCarthy war record. It is clearly derogatory and, very obviously, is meant to be so. The first count con-

cludes with the charge that these statements were false and defamatory and were published "with actual malice and with reckless disregard for their truth or falsity" and demands compensatory and exemplary damages.

The second cause of action alleges that the use of the names of Cohn and Schine in advertising the film and in having actors portray them in direct contravention of their expressed wishes constituted an invasion of their privacy under §§50 and 51 of the New York Civil Rights Law. This, they contend, entitles them to compensatory and exemplary damages.

Since the motion is less difficult of disposition as to the second cause of action, we turn first to that. Although the second count includes repetition and reallegation of the substan-

tive allegations of the first cause of action, it is too obvious for comment that the specific matters claimed to be defamatory in the film can have no application to the advertisement of the film or the selection of actors to portray Cohn and Schine. Hence, the claim of invasion of privacy must rest on the fact of such advertising and in the selection of the actors. As Time, Inc., v. Hill (supra) makes clear, this, standing alone, is not enough. The matter remains one of intense public interest. In the absence of a showing that the advertising was consciously false, i.e., that it was uttered with knowledge of its falsity or with a reckless disregard of the truth, or that the actors selected were such as to constitute a defamatory act, no cause of action is made out (Spahn v. Julian Messner, Inc., 21 N Y

2d 124; app. dism. 393 U.S. 1046).[7]

The first count represents a more difficult situation. If all that was presented were the two Kennedy-Kerr conversations and the Fort Dix incident, there would be no difficulty in holding that, to the ordinary observer, the overall effect of these scenes would not be defamatory (see Everett v. Gross, 22 A D 2d 257). However, these scenes do not stand alone. The "book-burning" scene specifically refers to both Cohn and Schine. Whether, in the context of

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7- While, under Time, Inc., v. Hill (385 U.S. 374), the emphasis is an infringement of privacy case is on the event, it is plain that a public official has a lesser expectancy of privacy than has a purely private individual. First, a public official courts the limelight. Accordingly, the public aspects of his life are fair game for the media. Secondly, accountability for his actions depend on widespread publicity. Finally, his fitness to remain or continue in public office justifies disclosure.

that scene, the ordinary observer of the film would conclude that they were among the book-burners, becomes a question which must be left to the trier of the fact in the context of the evidence submitted. Inasmuch as it is alleged that this scene is false and defamatory and was included with actual malice and with reckless disregard for its truth or falsity, the pleading is sufficient to meet constitutional standards.

The final matter to be considered is that branch of the motion seeking to strike certain allegations of the complaint as scandalous and impertinent and to compel plaintiffs to state their causes of action separately from one another.

A. The first paragraph sought to be stricken is paragraph 23 which deals, almost entirely, with McCarthy's

war service. There are only two items in that almost seven page paragraph which do not. One is a brief conversation between McCarthy and Miss Kerr in which Miss Kerr informs McCarthy that Vice President Nixon called to inform him that he had been appointed Chairman of the Committee on Government Operations and could, if he wanted to, become Chairman of its Permanent Subcommittee on Investigation. The other deals with a British writer (identified by plaintiffs as Cedric Belfrage), who, was deported, allegedly by reason of the efforts of McCarthy.

Most of the paragraph deals with a period antedating the relationship of Cohn and Schine with McCarthy. The remainder makes no mention of either Cohn or Schine.

Reputation is a personal qual-

ity. The purpose of an action for defamation, to the extent that the action is now cognizable in law, is to reimburse one for injury to his reputation. The wrong, if it exists, can be righted only by compensating the injured party; not his friends, associates, or defenders. As guilt in a criminal case is personal, and there can be no guilt by association, so, too, is defamation personal. There can be no defamation by association. Inasmuch as paragraph 23 makes no mention of plaintiffs and, however liberal the reading, cannot, as a matter of law, be read as defaming plaintiffs, it has no place in the complaint.

As to paragraph 13, which alleges a conspiracy to defame plaintiffs, it is clear that the viability of the first cause of action depends on

the specific acts of the defendants. An action for defamation may not be pleaded as a conspiracy (Russo v. Advance Publications, Inc., 33 A D 2d 1025).

Paragraphs 21(e) and 22(c) allege that the film depicts McCarthy and those associated with him, including Cohn, (paragraph 21[e]) and Schine (paragraph 22[c]) as ruthless, irresponsible men, bent on the destruction of individual freedoms and that this was damaging to both plaintiffs. No factual basis worthy of note, other than the book-burning incident, is given to support the conclusion. To the extent that plaintiffs rely upon this incident, it is repetitive and unnecessary. To the extent that it seeks to introduce something new, no factual basis is offered.

B. There is no warrant for compelling each of the plaintiffs to

separately state his cause of action. Particularly is this true inasmuch as the two individual plaintiffs, in respect of their work, were and are closely intertwined in the public mind.

Accordingly, that branch of the motion seeking to dismiss the complaint is granted only to the extent of dismissing the second cause of action. That branch of the motion seeking alternative relief is granted to the extent only of striking paragraphs 13, 21(e), 22(c) and 23. In all other respects, the motion is denied.

Dated: New York, New York
March 9, 1978

/s/ MB
HON. MAX BLOOM

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on April 5, 1979

Present--
Hon. Harold Birns, Justice Presiding,
Arnold L. Fein,
Leonard H. Sandler,
Vincent A. Lupiano, Justices.

Roy M. Cohn, G. David Schine and Saxe, Bacon & Bolan, P.C.,

Plaintiffs-Respondents-Appellants,

-against- 4773

National Broadcasting Co., Inc., Universal City Studios, Inc., and George Eckstein,

Defendants-Appellants-Respondents.

Cross-appeals having been taken to this Court by the defendants-appellants-respondents from so much of the order of the Supreme Court, New York County

(Bloom, J.), entered on March 13, 1978, as denied their motion to dismiss the first cause of action of the amended complaint or, in the alternative, to require plaintiffs separately to state and number their individual causes of action and claims of damage, and by plaintiffs-respondents-appellants from so much of said order as granted defendants' motion to dismiss the second cause of action and which struck paragraphs 13, 21(e), 21(c) and 23 of the amended complaint, and said appeals having been argued by Mr. Roy R. Kulcsar of counsel for plaintiffs-respondents-appellants, and by Mr. John C. Sabetta of counsel for defendants-appellants-respondents; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the

order appealed from be and the same is hereby modified, on the law, to grant the motion to dismiss the first cause of action, and otherwise affirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI

Clerk.

SUPREME COURT, APPELLATE DIVISION

First Department, February 1979

Harold Birns, J.P.
Arnold L. Fein
Leonard H. Sandler
Vincent A. Lupiano, JJ.

Roy M. Cohn, G. David Schine and Saxe, Bacon & Bolan, P.C., Plaintiffs-Respondents-Appellants,	
-against-	4773
National Broadcasting Co., Inc., Universal City Studios, Inc., Defendants-Appellants-Respondents,	
-and-	
George Eckstein, Defendant.	

Appeal by the defendants-appellants-respondents from so much of the order of the Supreme Court, New York County (Bloom, J.), entered on March 13, 1978, which denied their motion for an order dismiss-

ing the first cause of action of the amended complaint, or, in the alternative, requiring plaintiffs separately to state and number their individual causes of action and claims of damage, and a cross-appeal by the plaintiffs-respondents-appellants from so much of said order as granted the defendants-appellants-respondents' motion to dismiss the second cause of action of the amended complaint for failure to state a cause of action and struck paragraphs 13, 21(e), 22(c) and 23 of the amended complaint.

John C. Sabetta of counsel (Susan M. Campbell with him on the briefs; Townley & Updike, attorneys) for defendants-appellants-respondents.

Roy R. Kulcsar of counsel (John F. Lang and Michael J. Cacace with him on the briefs; Lang & Nesci, P.C., attorneys) for the plaintiffs-respondents-appellants.

4773 - Roy M. Cohn et al v. National Broadcasting Co. Inc. et al.

FEIN, J.

Defendants appeal from so much of an order as denied a motion by National Broadcasting Co., Inc. and Universal City Studios, Inc., to dismiss the first cause of action alleged in plaintiffs' amended complaint or, in the alternative, to direct plaintiffs to separately state and number. Plaintiffs cross-appeal to the extent that Special Term granted the motion dismissing the second cause of action and striking paragraphs 13, 21(e), 22(c) and 23 of the amended complaint.

The action, sounding in defamation and invasion of privacy, seeks damages resulting from the production by Universal of a film entitled "Tail Gunner Joe" and the exhibition of that film by NBC on February 6, 1977. Plaintiffs con-

tend that the film, portraying the era of the late Senator Joseph McCarthy, held them up to public ridicule and injured their reputation. Plaintiff Cohn, a member of the law firm Saxe, Bacon & Bolan, had served in the early 1950's as chief counsel to the Investigations Subcommittee of the Senate Government Operations Committee, chaired by Senator McCarthy. Plaintiff Schine was chief consultant to the subcommittee.

Special Term, in a scholarly opinion, set forth the historical events underlying the portrayals in the film and reviewed the applicable law in determining whether the pleaded allegations of the complaint stated actionable claims. We agree with Special Term that the second cause of action for invasion of privacy under §§ 50 and 51 of the Civil Rights Law fails to state a cognizable

claim for relief. Plaintiffs Cohn and Schine claim that the use of their names in advertising the film and in having actors portray them against their wishes constituted an invasion of privacy. As found by Special Term, the subject of the film remains a matter of public interest. In the absence of allegation and proof that the advertising was false and published with knowledge of its falsity or with reckless disregard of the truth, or that the selection of actors to portray Cohn and Schine was done in such manner as to be defamatory, no actionable cause is stated pursuant to the Civil Rights Law under the circumstances of this case. (Spahn v. Julian Messner, Inc., 21 NY 2d 124).

However, we disagree with Special Term's conclusion that the reference in the first cause of action to the

"book-burning scene" relating to McCarthy's attempt to purge American overseas information libraries of certain books by well-known American authors is sufficient to sustain that cause of action, on the face of the pleading.

Although the quoted dialogue refers to Cohn and Schine, we disagree with Special Term's finding that it is susceptible of a libelous meaning because a jury might find that an "ordinary observer of the film would conclude that they [Cohn and Schine] were among the book burners." The only reference to Cohn and Schine in this segment is that "they hit the road and went to Europe and they discovered [laughter] you're not going to believe this, they discovered some of the authors carried in our overseas librar-

ies -- this is really awful -- well they were also available in some Soviet Information centers. I mean like Mark Twain. Mark Twain. The Soviets had Mark Twain." Plaintiffs do not deny that they made the European trip and discovered the placement of the books.

Elsewhere in the segment there is a reference to the burning of books by "American Civil Servants", in one case at the "American Embassy in Sydney, Australia." There is no suggestion that Cohn or Schine participated in or were present at this or any other bock burning. Plaintiffs do not deny that some book burnings occurred.

The narrative also quotes Senator McCarthy as having stated that "our overseas libraries contained some 30,000 subversive volumes, paid for, of course, by the American taxpayer." This remark

is not attributed to plaintiffs who do not deny it was made. There is no basis here for a finding that the plaintiffs were among the book burners or participated in a campaign to burn books. Moreover there is no assertion by plaintiffs that any of the factual statements in the segment are untrue. It cannot be reasonably concluded that plaintiffs are charged with participating in a campaign to burn books.

To the extent that the film suggests plaintiffs may have some political responsibilities for the character and consequences of the investigation of the overseas libraries, and the climate which occasioned book burnings, it is not actionable in the absence of proof of falsity in reporting the facts on which the conclusion is based. "Opinions, false or not, libelous or not, are

constitutionally protected and may not be the subject of private damage actions provided [as here] that the facts supporting the opinions are set forth." (Rinaldi v. Holt, Rinehart & Winston, Inc., 42 NY 2d 369, 380, cert. den., 434 U.S. 969).

Plaintiffs also contend that this segment is defamatory because it is slanted and distorted in that (1) some of the authors and books referred to were not mentioned in the hearings or in the reports on the investigation; and (2) the film did not disclose the purchase and use in the libraries of books by known Communists or Communist supporters or by persons who were identified as having been involved or implicated in Soviet espionage. Apparently the complaint is that there is lack of a balanced presentation or the omission

of balancing facts. However this is essentially a matter of editorial judgment and not actionable (Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 120, 121).

Our review of the complaint compels the finding that, as to Cohn and Schine, there is no actionable libel as a result of the passages complained of in the film. The fact that both were involved with McCarthy and with the subcommittee hearings does not give rise to a derivative claim as a result of the portrayal of McCarthy in the film. Even assuming as true plaintiffs' assertion that the film unnecessarily distorted McCarthy's career and was unmistakably disparaging to the late Senator, this would not giye rise to a claim for defamation by plaintiffs as

his former aides and advisors.

Moreover, were the film found to be defamatory, which it was not, both Cohn and Schine clearly were public figures within the purview of New York Times v. Sullivan, 376 U.S. 254. Therefore, the publication was legally protected by a qualified privilege "unless . . . [plaintiff] proves that the publication was made with actual malice, that is, with knowledge that it was false or with reckless disregard as to whether it was false or not...[that is] with the intent to inflict harm through falsehood" (Silbowitz v. Lepper, 32 AD 2d 520, 521). Reckless conduct may be shown by proof that the publisher "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible

parties." (Chapadeau v. Utica Observer, 38 NY 2d 196, 199). It may also be demonstrated by "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (Curtis Pub. Co. v. Butts, 388 U.S. 130, 155); or by a "high degree of awareness of . . . probable falsity" (Garrison v. Louisiana, 379 U.S. 64, 74). The subject matter of the film was also a matter of public interest, requiring proof of actual malice to sustain the action (Rosenbloom v. Metromedia, 403 U.S. 29). The fact that both Cohn and Schine have returned to private life does not, in any way, mitigate their burden of demonstrating actual malice to sustain a cognizable claim for libel (see, Gertz v. Robert Welch, Inc., 418

U.S. 323). So far as appears there is no showing of falsity and no showing that the film was composed and thereafter exhibited with actual malice. The general conclusory assertion that it was maliciously published is insufficient. Nor is the complaint at all sufficient in setting forth special damages, as required, where the words are not libelous per se. There is not even the barest showing that Cohn or Schine were actually damaged as a result of the film. So far as appears, Cohn, at least, has openly used his prior association with the late Senator McCarthy to his personal gain.

Finally, the amended complaint fails to state a cause of action on behalf of Cohn's law firm, Saxe, Bacon & Bolan. It does not complain of or seek recovery for any defamatory portrayal or

utterance directed against it. The law firm was never mentioned during the course of the film. The fact that Cohn, as a member of the firm, seeks recovery for an alleged defamatory work, cannot give rise to a derivative claim on behalf of his employer or partners in the firm, upon mere conclusory assertion that the reputation of the firm is inextricably tied to Cohn as its principal producer of income. No such derivative claim for defamation exists. Moreover, even assuming that there was defamation, which there was not, the law firm as a professional corporation, must establish that the libel directly affected its credit and resulted in pecuniary injury or loss. This requires sufficient allegations of special damages which are clearly lacking here (see, New York Bureau of Information v.

The Ridgway-Thayer Company, 193 NY 666, revg. on the dissenting opinion of Justice Ingraham in 119 App Div 339, 342; Everett v. Gross, 22 AD 2d 257).

Accordingly, the order, Supreme Court, New York County (Bloom, J.), entered March 13, 1978, granting the motion of defendants National Broadcasting Co., Inc. and Universal City Studios pursuant to CPLR 3211(a)(7), dismissing the second cause of action and striking paragraphs 13, 21(e), 22(c) and 23 of the amended complaint, but denying the branch of the motion to dismiss the first cause of action, should be modified, on the law, to grant the motion to dismiss the first cause of action, and otherwise affirmed, without costs or disbursements on the appeal.

All concur.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-209

ROY M. COHN, G. DAVID SCHINE AND SAXE, BACON & BOLAN, P.C.

Petitioners,

v.

NATIONAL BROADCASTING COMPANY, INC. ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1980.

/s/ Thurgood Marshall
Associate Justice of
the Supreme Court of
the United States

Dated this 5th

day of September, 1980